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No. 96-323

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

K.R., An Infant, By Her Parents and Next Friends, M.R. and K.R.R., and M.R. and K.R.R.,

Petitioners,

v.

ANDERSON COMMUNITY SCHOOL CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY BRIEF IN OPPOSITION TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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PETITIONER'S REPLY BRIEF IN OPPOSITION TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ISSUES PRESENTED

The United States in its Amicus brief in 96-323, raises two main points which Petitioners feel require a reply:

I. Has Part B of the Individuals with Disabilities Education Act (IDEA), as amended by the Individuals with Disabilities Education Act Amendments of 1997 (IDEA Amendments Act) caused the issue as raised in the Petition to this Court to be moot. *See* H.R.5., 105th Cong., 1st Ses. (1997) (reproduced 143 Cong. Rec. H2498-H2531 (daily ed. May 13, 1997, 105th Cong., 1st. Sess. (1997) (addressed at 143 Cong. Rec. S 4401-S4413 (daily ed. May 14, 1997)).

A. Petitioners raised the question of whether IDEA, and its accompanying regulations requires Anderson Community School Corporation to provide K.R., a child with disabilities as defined in IDEA, an instructional assistant on site at a private parochial school where K.R.'s parents have voluntarily chosen to enroll her. (Pet. for Cert. p. i) However, the United States now believes the IDEA Amendments Act changes that to be whether the Individuals with Disabilities Education Act requires participating states and localities to use their own funds to provide special education services to disabled children whose parents have freely chosen to enroll them in private schools. (Amicus p.(I)) The Petitioners disagree that the issue has changed. The core of the United States position centers on whether IDEA compels participating states and localities to spend local and state money to ensure that disabled private-school children receive publicly funded special education

services generally "comparable" to those provided to public school children. (Amicus p.8)

The United States concludes that participating states and localities are not so compelled as a result of the IDEA Amendments Act. (Amicus p. 9) Further, the United States concludes that IDEA (as amended) §612(a)(10)(A)(i)(I) only requires a proportionate amount of Federal funds by made available to those children who are enrolled by their parents in private schools. (Amicus p. 13)

DISCUSSION

Petitioners do not disagree that this is what the IDEA (as amended) now says, but do disagree that this so simply removes the issue from any further consideration. If the position taken by the United States regarding the IDEA (as amended) is indeed correct, Petitioners submit that instead of clarifying the question of whether K.R. is entitled to service at her private parochial school, the question is at best unchanged, and at worst further confused.

The IDEA (as amended) states that part of its purposes under §601 (d) are:

> "(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.
>
> (B) to insure that the rights of children with disabilities and parents of such children are protected and

> (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities."

See H.R. 5, p. 6

Clearly, the purpose of IDEA (as amended) is to ensure provision of services to all children and makes no distinction in its purpose between public and private school children with disabilities.

The IDEA (as amended) further states that in order for a state to be eligible for assistance, it must demonstrate that is has in effect policies and procedures to ensure that the state meets certain conditions in §612 (a), one of which is:

> "(1) Free Appropriate Public Education
>
> (A) In General-A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, . . ."

See H.R.5., p. 24

Another condition that a state must meet under §612 (a) is:

> "(3) Child Find-
>
> (A) In General- All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services."

See H.R.5, p. 25.

The State eligibility requirements under §612 (a) to this point also appear to refer to all children with disabilities, and make no distinction between public and private school children with disabilities. No distinction between public and private school children is discussed under §612(a) until §612(a)(10)(A)(i)(I):

> "(I) Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this part."

See H.R.5, p. 26 This section appears to limit the Federal requirements of §610(a)(10)(A)(i) which provides for participation by children in the program who are enrolled by their parents in private elementary and secondary schools. (This is found in the Amicus Appendix at p.(1a)). The United States in its Amicus Curiae brief, at pp 8-13, reasons that §612 (a)(10)(A)(i)(I) is dispositive of the issue raised by *K.R.* regarding the provision of comparable benefits to private school children, because the local school is now only responsible for the proportionate part of the Federal funds made available, and that the same applies to the comparable benefits decisions as revealed in *Russman v. School*, 85 F.3d 1050 (2d Cir 1996), *petitions for cert. pending sub nom. Board of Educ. v. Russman*, No. 96-776, *Cefalu v. East Baton Rouge Parish Sch. Bd.*, 103 F.3d 393 (5th Cir. 1997); *Fowler v. Unified Sch. Dist. No. 259, 107 F.3rd 797 (10th Cir. 1997), petition for cert. Pending*, No. 96-1633.

The United States fails to discuss §612(a)(18)(C) which states:

> "Prohibition against supplementation and conditions for waiver by Secretary. . ., funds paid to a State under this part will be used to supplement the level of

> Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to children with disabilities under this part and in no case to supplant such Federal, State, and local funds, except that where the State provides clear and convincing evidence that all children with disabilities have available to them a free appropriate public education, the Secretary may waive, in whole or in part, the requirements of this subparagraph if the Secretary concurs with the evidence provided by the State."

See H.R. 5, p. 32

As this section provides no exception for §612(a)(10)(A)(i)(I), to accept the reasoning of the United States would leave the IDEA (as amended) with provisions that are in conflict with each other. For the State or local educational unit not to use State money for provision of services to children with disabilities in private schools appears to be in direct violation of §612(a)(18)(C).

The position of the United States also fails to consider the repercussions to states as a result of the creation of the opportunity for the public school to simply discriminate based on cost against those students who are the most severely disabled. The application of IDEA (as amended) §612(a)(10)(A)(i)(I) as proposed by the United States would be in conflict with Title II of the Americans with Disabilities Act, 42 U.S.C. §§12131-12134.

42 U.S.C. §§12131 provides:

> "Subject to the qualifications of this subchapter. No qualified individual with a disability shall, by reason of such disability, be excluded from participation or

> be denied the benefits of the services, programs, or activities of a public entity"

This regulation at 28 C.F.R. §35.130 provides:

> "(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or be subjected to discrimination by any public entity."; and
>
> "b(1)(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others."

Although the Americans with Disabilities Act is not applicable to Federal Agencies, it clearly defines State and local units of government as public entities. *See* 42 U.S.C. §12131 Consequently, the United States position would leave states and local schools in a precarious position regarding disabled children's educational rights based on cost. IDEA (as amended) does take into consideration the Americans with Disabilities Act, and in fact, requires that any construction of new facilities or alterations of existing facilities must be in compliance with Americans with Disabilities Accessibility Guidelines for Buildings and Facilities at §605(b)(1).

See H.R.5 p. 11.

The second part of the position of the United States is to dispense with the requirements of 34 C.F.R. 76.654(a) which requires that the program benefits a local school district provides for students enrolled in private school are comparable in quality, scope, and opportunity for participation to the program benefits that the school provides for students enrolled

in public schools. (Amicus pp.15,16) The United States reasons that 34 C.F.R. 76.654(a) is no longer applicable in light of IDEA (as amended) §612(a)(10)(A)(i)(I). (Amicus p. 15) The United States concludes that IDEA (as amended) forecloses K.R.'s claim of statutory entitlement to specific, publicly funded special education services comparable to those the State and locality furnish with their own funds to disabled private school children. (Amicus p. 18) The United States cites *Wheeler v. Barrera*, 417 U.S. 402 (1974) and attempts to distinguish its decision regarding comparable services by limiting it to being applicable to only federal funds. (Amicus p.18n.10). Petitioners submit this is precisely the situation in *Wheeler*. Wheeler required true comparability in the services private school children actually received, and further held the mere offer to let private school children come to the public school system to receive the benefit Congress intended, did not comply with the statute's mandate. *Wheeler Id* at 421-425. The United States continues to claim that *Wheeler* does not apply. In fact, the language of 34 C.F.R. 76.654(a) is so similar to the language of the original 45 C.F.R. §121a.455 in support of 20 U.S.C. 1413 (a)(4)(A) of the Education for Handicapped Act, as to be indistinguishable in meaning. Further 45 C.F.R. §121a.455 was promulgated by the Secretary, citing *Wheeler* as authority in 1978. The United States contends that the district court in *K.R.* misinterpreted 34 C.F.R.76.654(a) as did *Russman*, *Cefalu*, and *Fowler* (amicus pp. 7-10). Petitioners submit that IDEA (as amended) does not change the issue in *K.R.*, nor does it change the issues in *Russman*, *Cefalu*, and *Fowler*. If the cases were remanded, then the possibility would be great that K.R. would not be able to receive services in Indiana, but if she lived in New York, Louisiana, or Kansas she could.

The IDEA (as amended) will effectively eliminate the freedom to place K.R. in a school of M.R. and K.R.R.'s choice

and receive benefits under IDEA, according to the United States interpretation. Yet no section of IDEA (as amended) is cited, or can be found, which indicates this change of purpose in the amendments. In *Zobrest v. Catalina Foothills Schl. Dist.*, 113 S.Ct. 2462, at 2467, this Court did determine that there is choice for such privately placed students under IDEA.

Petitioners submit that it is essential for the Supreme Court to grant Certiorari in this case, because there are still significant issues not resolved by IDEA (as amended) and which will continue to leave a conflict between the Seventh Circuit, and the applicable decisions of this Court, and the Court of Appeals for the Second Circuit, the Fifth Circuit, and the Tenth Circuit.

II. A. Has Part B of IDEA (as amended) created a violation of the neutrality principle of the establishment clause of the First Amendment.

The United States is interpreting IDEA (as amended) as allocating the IDEA financial resources particularly to children attending public schools. (Amicus p. 19). The United States further indicates this is not a conflict with the neutrality principle of the establishment clause of the First Amendment to the United States Constitution. Petitioners disagree with the United States interpretation of IDEA as amended) §612(a)(10)(A)(i)(I), and how it can limit the use of IDEA resources, so as to require K.R., and other children like her who are severely disabled to only be able to acquire services by attending public school. If this is so, then K.R. cannot be a private school student, but must become a public school student in Anderson Community Schools. Petitioners believe this interpretation clearly conveys a message of government enforcement or disapproval of K.R.'s religion and violates the core purpose of the Establishment Clause. *Grand Rapids School District v. Ball*, 473 U.S. 373,389, 87 L.Ed2d 267, 105 S.Ct. 3216 (1975 *See also Rosenberger v. Rector and Visitors*

of the University of Virginia, 115 S.Ct. 2510. 132 L.Ed. 2d 700 (1995); *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 114 S. Ct. 2481, 129 L.Ed.2d 546 (1994); *Board of Education v. Allen*, 392 U.S.2236, 2249, 20 L.Ed2d 1060, 88 S.Ct.1923 (1968).

B. Have Petitioners properly raised their second question dealing with the neutrality principle of the Establishment Clauses of the first Amendment (Pet. For Cert.)

The United States has challenged the Petitioners' second question as not being appropriately raised. Petitioners addressed this previously in their Reply to Respondent, Anderson Community School Corporation. (Reply pp. 3-5).

Petitioners would also submit that the passage of IDEA (as amended) raised the neutrality principal issue and it is necessary to an intelligent resolution of the case. *Vance v. Terazas*, 444 U.S. 252, 258-259 M.S (1980); *Cuyler v. Sullivan*, 446 U.S. 335, 342-343 (1980). Petitioners believe that this objection is not will founded and should be denied.

CONCLUSION

The amicus brief submitted by the United States reflects the same confusion regarding this issue as evidenced by the disparate court opinions in the similar cases cited previously. The petition for a writ of certiorari should be granted by this Court so that this split of authority between the districts can be resolved, and the parents, schools, children, and courts involved with these issues can receive the guidance they desperately need in order to confidently move forward in providing an education to children in similar situations.

Respectfully Submitted

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